

FCC MAIL SECTION

DEC 23 12 02 PM '96

Federal Communications Commission

DA 96-1483

Before the  
Federal Communications Commission  
Washington, D.C. 20554

In the Matter of )  
 )  
Amendment of Section 73.202(b), ) MM Docket No. 93-28  
Table of Allotments, ) RM-8172  
FM Broadcast Stations. ) RM-8299  
(Colonial Heights, Tennessee )

**MEMORANDUM OPINION AND ORDER**  
**(Proceeding Terminated)**

**Adopted: December 13, 1996**

**Released: December 20, 1996**

By the Chief, Policy and Rules Division:

1. The Commission has before it a petition for reconsideration of the *Report and Order* ("R&O") in the above-docketed proceeding, 9 FCC Rcd 6767 (1994), filed by Murray Communications ("Murray"), permittee of Station WLJQ(FM), Channel 290A (105.9 MHz), Colonial Heights, Tennessee. No comments were filed by any other party. Murray filed a supplement to its petition and later filed a motion to sever. We will grant the petition for reconsideration and dismiss the motion to sever as moot.

2. The Commission issued a *Notice of Proposed Rule Making* ("Notice") in this proceeding, 8 FCC Rcd 1794 (1993), in response to a petition for rule making (RM-8172) filed by Murray. The *Notice* proposed the substitution of Channel 290C3 for Channel 290A at Colonial Heights and the modification of Murray's construction permit to specify operation on the Channel 290C3 upgrade. Murray subsequently filed a counterproposal (RM-8299) to its own proposal, requesting the substitution of Channel 240C2 (95.9 MHz) or, alternatively, Channel 240C3 for Channel 290A at Colonial Heights and modification of its permit accordingly. In order to accommodate its counterproposal, Murray also requested the following channel substitutions: Channel 290A for Channel 231A (94.1 MHz) at Station WCTU(FM), Tazewell, Tennessee; Channel 231A for Channel 240A at Station WMXK(FM), Morristown, Tennessee; and Channel 252A (98.3 MHz) for Channel 290A at Station WHAY(FM), Whitley City, Kentucky. As a final accommodation, Murray proposed a relocation of the transmitter site for Station WAEY-FM, Channel 240A, Princeton, West Virginia.

3. The Commission subsequently issued an *Order to Show Cause*, 8 FCC Rcd 7901 (1993), to WFSM, Inc. and Franklin Communications, Inc. ("Franklin"), respective licensees of Stations WCTU(FM), Tazewell, and WMXK(FM), Morristown, directing them to show cause why their licenses should not be modified to specify operation on Channel 290A in lieu of Tazewell Channel 231A and Channel 231A in lieu of Morristown Channel 240A. Franklin filed opposing comments, and Murray filed responsive comments. The *R&O* granted Murray's initial proposal and denied its counterproposal, rejecting its contention that the counterproposal

constituted an incompatible channel swap. Therefore, the issues raised in the responsive pleadings of Franklin and Murray to the *Order to Show Cause* were not addressed.

4. We determined that Murray's counterproposal did not possess the attributes of mutually exclusivity and therefore was not an incompatible channel swap. We stated that Murray "did not propose to swap its current operating channel with another authorized facility but rather proposes a number of channel substitutions plus one station moving its transmitter site in order to accommodate [Murray's] upgrade." This did not constitute a mutually exclusive relationship contemplated to comply with Section 1.420(g)(3) of the Commission's Rules because all substitutions were not each mutually exclusive, qualifying the proposal for an upgrade without consideration of competing proposals. We decided instead to grant Murray's initially proposed allotment of Channel 290C3, which would not require an existing station to change either its frequency or site.

5. *Petition for Reconsideration.* Murray takes issue with our finding that its proposal did not constitute an incompatible channel swap, and, therefore, did not qualify for treatment under Section 1.420(g)(3). Murray argues, citing numerous cases, that wherever a "mutually exclusive relationship has been found to exist among the channels proposed for substitution, the Commission has approved the proposed substitutions," and where it has been found lacking, the Commission has not approved them. Murray alleges that in one of the cited cases, *Angola, Indiana*, 6 FCC Rcd 1230 (1991), the mutually exclusive channel substitutions approved as an incompatible channel swap were "almost identical" to the substitutions proposed in this case. Murray contends that the fact that an additional channel substitution for Station WHAY(FM) at Whitley City and relocation of Station WAey(FM)'s site were required does not provide the basis for distinguishing this case from *Angola*. Murray notes that both stations consented to the substitution and the site relocation, respectively. It further contends that the Commission has in the past approved of incompatible channel swaps where other substitutions were required to implement the swap.

6. Murray argues, nevertheless, that because no competing expressions of interest were filed in response to its counterproposal, it was unnecessary to reach the issue of whether its proposal should be considered an incompatible channel swap under Section 1.420(g). It cites *Madison, South Dakota*, 9 FCC Rcd 3373 (1994), and *St. Augustine, Florida*, 7 FCC Rcd 4138 (1992), for the proposition that it is unnecessary to determine whether a proposal qualifies as an incompatible channel swap whenever no timely expressions of interest in the proposed non-adjacent channel allotment are filed. Thus, Murray contends that, notwithstanding whether or not the channel relationships in the instant case qualify for treatment as incompatible channel swaps, its proposal should not have been dismissed.

7. *Discussion.* After careful review of Murray's petition for reconsideration and review of the relevant cases, we will grant its request for a Class C2 upgrade. While its proposal does not qualify as an incompatible channel swap, its upgrade proposal will be

granted as a non-adjacent channel upgrade because no timely expressions of interest were filed. See e.g. *Madison, South Dakota*, 9 FCC Rcd 3373 (1994).

8. Notwithstanding, we take this opportunity to clarify why Murray's proposed allotment plan does not itself constitute an incompatible channel swap. In order to be an incompatible channel swap, each of the channel substitutions in four communities that Murray proposed must be mutually exclusive and unique, that is, at the station's transmitter site for each community, the channel to be substituted is the only channel that would be available, i.e. fully-spaced. Here, there is a proposed daisy chain of channel swaps involving the three communities of Colonial Heights, Morristown, and Tazewell, one of which is the proposed channel swap of Channel 290A at Colonial Heights to Tazewell. However, Channel 290A would be in conflict with Channel 290A at Whitley City. Therefore, to avoid this conflict, Murray chose Channel 252A at Whitley City to permit the three-community series of substitutions to serve as the basis for the non-adjacent upgrade at Colonial Heights. However, the Commission requires that each channel substitution, including those constituting the swap between Tazewell and Colonial Heights must be mutually exclusive and the only channel available at the site for the respective community.

9. The fact that the substitution at Whitley City is required to accommodate Channel 290A at Tazewell demonstrates that it is not unique because of the possibility that there are other Class A channels that might be substituted at Tazewell. Murray has not discharged its burden to demonstrate that Channel 290A is the only channel that is available at the Tazewell site. Moreover, the need for the Whitley City substitution provides the basis for distinguishing this case from *Angola*, contrary to Murray's assertion that the Whitley City substitution is somehow incidental to the finding of an incompatible channel swap. Thus, it cannot be said that Channel 290A is the only channel that can be substituted for Channel 231A at Tazewell. Channel 290A at Colonial Heights and Channel 231A at Tazewell do not constitute a mutually exclusive channel relationship, as required to fall within the purview of Section 1.420(g)(3). Therefore, we cannot regard this relationship as an incompatible channel swap and cannot treat the non-adjacent channel substitution of Channel 240C2 for Channel 290A at Colonial Heights as mutually exclusive.

10. *Other Matters.* Because of the prior finding that Murray's proposal did not qualify for treatment under Section 1.420(g), in the *R&O*, we deemed it unnecessary to address the issues raised by Franklin, the only party to respond to the *Order to Show Cause*. As we conclude above, while Murray's counterproposal is not an incompatible channel swap, that counterproposal indeed is protected from competing expressions of interest and will be granted. Such proposal requires a change in the operating frequency of Franklin's Station WMXK, Morristown. In its response to the *Order to Show Cause*, Franklin alleges that a change of channel at its Station WMXK, Morristown, would have particularly adverse consequences because it would cause the station to change its frequency to the "frequency of another station in its same market." It claims that "there is large coverage overlap between the two stations," Tazewell being only "53 kilometers from Morristown." It also cites the costs of changing its logos on all of its plant, the new advertising necessitated by its new

operating frequency, and the costs of obtaining new equipment. Finally, because of the major expenses Murray will incur by having to reimburse Franklin and two other stations for like expenses, Franklin questions Murray's financial viability to compensate three stations for changing their frequencies and a fourth for moving its transmitter site. Accordingly, Franklin requests that Murray place the necessary funds in escrow with a third party as security for payment of expenses it is likely to incur, citing *Columbus, Nebraska*, 59 RR 2d 1184 (1986). Franklin estimates that its expenses will total at least \$25,500; it requests that this amount be placed in escrow.

11. It has been our consistent policy under *Circleville, Ohio*, 8 FCC 2d 159 (1967), that a party such as Murray, which would benefit from the change of frequency of another station, is required to reimburse that station for the reasonable costs associated with its channel change. Franklin's contentions that listeners would be confused by the small overlap of its service contours with that of Station WCTU(FM) in Tazewell<sup>1</sup> is not a persuasive reason to alter our policy to have the benefiting party reimburse all reasonable expenses. Murray has stated it would reimburse Franklin's costs of changing all of its logos throughout the company, the equipment changes necessary for changing frequencies, and other reasonable costs. In *Columbus*, we indicated only that it was "conceivable" that we might require that funds be placed in escrow. There has been no evidence presented to cause us to waver from our policy not to require demonstrations of financial ability in the context of a rule making request. Moreover, the policy set forth in *Columbus* does not apply, wherein proposals for a change in channels at more than two existing stations will not be entertained. Murray has requested involuntary channel substitutions at only two stations.

12. We conclude that while the *R&O* found correctly that Murray's counterproposal to upgrade Station WLJQ(FM) at Colonial Heights by substituting Channel 240C2 for Channel 290A (with the necessary channel substitutions at other communities) did not constitute an incompatible channel swap, its proposal is acceptable. It falls within the terms of Section 1.420(g), because no other expression of interest was filed. Therefore, Murray's petition for reconsideration will be granted and its non-adjacent channel upgrade proposal will be granted.

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<sup>1</sup> The coverage of Franklin's Morristown Station WMXX(FM) would overlap that of Station WCTU(FM) in Tazewell, extending their respective 60 dBu service contours by 17.3 kilometers into the other station's service area. This assumes that the contours would be ideally omnidirectional, given the current facilities for WCTU(FM), 2.75 kW effective radiated power ("ERP") and 150 m. antenna height above average terrain ("HAAT"), and for WMXX(FM), 0.48 kW ERP and 348 m. HAAT, both of which stations achieve the maximum Class A contour distance of 28.3 km.

13. *Technical summary.* Channel 240C2 can be allotted to Colonial Heights, Tennessee at Station WLJQ(FM)'s transmitter site as specified in its construction permit,<sup>2</sup> and its authorization will be modified to specify the higher class channel. In order to accommodate the Colonial Heights allotment, the following channels can be substituted at the respective communities: Channel 290A at Tazewell, Channel 231A at Morristown, and Channel 252A at Whitley City, each at the transmitter sites for Stations WCTU(FM), WMXK(FM), and WHAY(FM), respectively. Each of the licenses for the latter three stations will be modified to specify the new channel allotment. Additionally, to further accommodate the Colonial Heights upgrade, the licensee for Station WAEY(FM) has agreed to relocate its transmitter to another site.<sup>3</sup>

14. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective February 3, 1997, the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the communities listed below, as follows:

<u>City</u>	<u>Channel No.</u>
Colonial Heights, Tennessee	240C2
Tazewell, Tennessee	290A
Morristown, Tennessee	231A
Whitley City, Kentucky	252A

15. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of Murray Communications for Station WLJQ(FM), Colonial Heights, Tennessee, IS MODIFIED to specify operation on Channel 240C2 in lieu of Channel 290A, subject to the following conditions:

- (a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;

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<sup>2</sup> The coordinates for Channel 240C2 at Colonial Heights are North Latitude 36-35-35 and West Longitude 82-37-16. This site is restricted to 16.7 km (10.4 mi) northwest of the community.

<sup>3</sup> The coordinates for Channel 290A at Tazewell are North Latitude 36-27-32 and West Longitude 83-35-07. The coordinates for Channel 231A at Morristown are North Latitude 36-13-40 and West Longitude 83-19-58. The coordinates for Channel 252A at Whitley City, Kentucky are North Latitude 36-44-39 and West Longitude 84-28-37. The coordinates for the new transmitter site for Station WAEY(FM), Channel 240A, Princeton, West Virginia, are North Latitude 37-25-00 and West Longitude 81-02-00.

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620 of the Commission's Rules; and

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental assessment pursuant to Section 1.1307 of the Commission's Rules.

16. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of Station WCTU(FM), Tazewell, Tennessee, IS MODIFIED to specify operation on Channel 290A in lieu of Channel 231A, subject to the following conditions:

(a) Nothing contained herein shall be construed as authorizing any change in Station WCTU(FM) (File No. BLH-911218KB), except for the channel as specified above. Any other changes, except those so specified under Section 73.1690 of the Rules, require prior authorization pursuant to an application for a construction permit (FCC Form 301).

(b) Program tests may be conducted in accordance with the provisions of Section 73.1620 of the Rules, PROVIDED the transmission facilities comply in all respects with license File No. BLH-911218KB, except for the channel as specified above, and a license application (FCC Form 302) is filed within 10 days of commencement of program tests.

17. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of Station WMXK(FM), Morristown, Tennessee, IS MODIFIED to specify operation on Channel 231A in lieu of Channel 240A, subject to the following conditions:

(a) Nothing contained herein shall be construed as authorizing any change in the license for Station WMXK(FM) (File No. BML-900502KD), except the channel as specified above. Any other changes, except those so specified under Section 73.1690 of the Rules, require prior authorization pursuant to an application for construction permit (FCC Form 301).

(b) Program tests may be conducted in accordance with the provisions of Section 73.1620 of the Rules, PROVIDED the transmission facilities comply in all respects with license File No. BML-900502KD, except for the channel as specified above, and a license application (FCC Form 302) is filed within 10 days of commencement of program tests.

18. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of Station WHAY(FM), Whitley City, Kentucky, IS MODIFIED to specify operation on Channel 252A in lieu of Channel 290A, subject to the following conditions:

(a) Nothing contained herein shall be construed as authorizing any change in the license for Station WHAY(FM) (File No. BML-920702KD), except the channel as specified above. Any other changes, except those so specified under Section 73.1690 of the Rules, require prior authorization pursuant to an application for construction permit (FCC Form 301).

(b) Program tests may be conducted in accordance with the provisions of Section 73.1620 of the Rules, PROVIDED the transmission facilities comply in all respects with license File No. BML-920702KD, except for the channel as specified above, and a license application (FCC Form 302) is filed within 10 days of commencement of program tests.

19. IT IS FURTHER ORDERED, That the coordinates for the transmitter site of Station WAEY(FM), Channel 240A, Princeton, West Virginia are North Latitude 37-25-00 and West Longitude 81-02-00.

20. IT IS FURTHER ORDERED, That the Petition for Reconsideration filed by Murray Communications IS GRANTED in part and denied in part.

21. IT IS FURTHER ORDERED, That the Motion to Sever filed by Murray Communications IS DISMISSED AS MOOT.

22. IT IS FURTHER ORDERED, That the Secretary shall send a copy of this *Memorandum Opinion and Order* by Certified Mail, Return Receipt Requested, to the licensees as follows:

Mr. Tim Lavender  
Licensee, WHAY  
P.O. Box 69  
Whitley City, KY 42653

Betap Broadcasting Corporation  
No. 1 Radio Lane  
Lilly Grove Addition  
Princeton, WV 24740

Murray Communications  
1028 Woodstone Drive  
Colonial Heights, TN 37663

WFSM, Inc.  
P.O. Box 1409  
LaFollette, TN 37766

Newport Publishing Company  
P.O. Box 70  
510 West Economy Road  
Morristown, TN 377815

23. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

24. For further information concerning the above, contact J. Bertron Withers, Jr., Mass Media Bureau, (202) 418-2180.

FEDERAL COMMUNICATIONS COMMISSION

Douglas W. Webbink  
Chief, Policy and Rules Division  
Mass Media Bureau